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No. 91-____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAUL CASPARI and WILLIAM L. WEBSTER

Petitioners,

vs.

TERRY D. McINTYRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER A HABEAS CORPUS APPLICANT MAY REQUEST THE RETROACTIVE APPLICATION OF NEW LAW UNDER THE DOUBLE JEOPARDY CLAUSE UNDER A THEORY THAT THE NEW RULE WOULD DEPRIVE THE GOVERNMENT OF THE POWER TO PUNISHMENT.

II.

WHETHER THE DOUBLE JEOPARDY CLAUSE PROHIBITS A SECOND TRIAL FOR CONDUCT WHERE EVIDENCE OF THAT CONDUCT WAS ADMITTED AT AN EARLIER TRIAL, BUT THE GOVERNMENT HAD NO BURDEN TO PRESENT EVIDENCE OF THAT CONDUCT OR TO PROVE THAT CONDUCT BEYOND A REASONABLE DOUBT, AND WHERE THE STATE PROPOSES TO ADMIT EVIDENCE OF CONDUCT THAT WAS PROVED BEYOND A REASONABLE DOUBT AT AN EARLIER TRIAL, BUT WHICH THE GOVERNMENT HAS NO BURDEN TO PRESENT EVIDENCE OF THAT CONDUCT OR TO PROVE THAT CONDUCT BEYOND A REASONABLE DOUBT AT A SECOND TRIAL.

III.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN GRADY V. CORBIN.

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PETITION FOR WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The panel opinion of the United States Court of Appeals granting the writ of habeas corpus is reported at 938 F.2d 899 (8th Cir. 1991) and is published in the Appendix at A-1. The order sustaining and adopting the

Magistrate's Report and Recommendation is not reported, but is included in the Appendix (A-66). The Magistrate's Report and Recommendation is not published, but is included in the Appendix (A-47). The earlier orders of the district court and the Magistrate are also unpublished, but are included in the Appendix (A-34, A-40, A-42).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on July 15, 1991. The petition for rehearing or rehearing en banc was denied by the Court on August 30, 1991, as amended on September 4, 1991 (A-89). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 13.1, the present petition for writ of certiorari was required to be filed by petitioners[1] within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1]Petitioner Paul Caspari, Superintendent of the Missouri Eastern Correctional Center, is the successor in office to Myrna Trickey, former superintendent of the Missouri Eastern Correctional Center, and is respondent's curent custodian. Under 28 U.S.C. § 2254, Rule 2(a), and Supreme Court Rule 35.03, Paul Casari is a proper petitioner before this Court. Since the sentence respondent challenged was a sentence to be served in the future, Missouri Attorney General William L. Webster is also a proper petitioner before this Court. 28 U.S.C. § 2254, Rule 2(b); Supreme Court Rule 14.1(b).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was found guilty by a jury of stealing a motor vehicle and was sentenced by the court as a persistent offender to a term of ten years' imprisonment to be served consecutively to an existing ten-year sentence (A-79). Section 570.030.3(3)(A), RSMo 1986. This conviction and sentence for stealing was imposed by the Circuit Court of St. Louis County, Missouri (A-3).

The circumstances surrounding respondent's crime were summarized by the Missouri Court of Appeals on direct appeal.

> On November 22, 1985, a man who identified himself as "Johnny" went into Kirkwood Mitsubishi and told salesman Steven George he wanted to test-drive a Mitsubishi Galant. While George went to get the keys to a Galant demonstrator, "Johnny" was left alone to look at a Galant on the showroom floor. The showroom car had its keys in its ignition, and those keys were similar to the keys to the demonstrator Galant.

After a test drive, "Johnny" returned a set of Galant keys to George who returned them to the dealership "key board." About 15 minutes later, George and another salesman discovered the demonstrator Galant was missing and the keys on the board were from the showroom Galant at which "Johnny" had been looking, not the demonstrator. Two days later, St. Louis city police officers saw the Galant, which was listed on a "hot sheet" of stolen cars. After a pursuit, police officers stopped the Galant and arrested defendant, who was driving, and a passenger. There was a set of keys in the vehicle's ignition.

Jack Schneedle, a Kirkwood police officer, prepared a photo array to show to automobile salesman George. Two of the photos, obtained from the St. Louis Police Department, were of defendant and the passenger arrested with him; three were from the Kirkwood Police Department files. On November 27, 1985, Detective Schneedle took the five photographs to the Kirkwood Mitsubishi dealership, showed them to George, and asked him if any of the photos were of the person who was in the dealership

and took a drive in the demonstrator Galant on November 22, 1985. Schneedle did not tell George anything else. George identified the photograph of defendant as "Johnny."

On December 19, 1985, defendant was charged with first degree tampering for operating the Galant in the City of St. Louis. He was found guilty by a jury on June 5, 1986, and sentenced July 11, 1986, by the court as a prior and persistent offender to 10 years' imprisonment. [The Missouri Court of Appeals] affirmed his tampering conviction on appeal. **State v. McIntyre**, 735 S.W.2d 111 (Mo.App. 1987) [A-73].

On August 9, 1986, defendant was charged with stealing the Galant based on his alleged appropriation of it from Kirkwood Mitsubishi. His motion to dismiss the stealing charge, based on a claim of double jeopardy, was denied February 23, 1987.

At defendant's trial on the stealing charge, automobile salesman George identified the photograph of defendant that he had previously identified for Detective Schneedle. George also

> identified defendant in court as "Johnny," the person who test-drove the Galant that later was stolen. Defendant also was identified in court by the St. Louis police officer who arrested him while driving the Galant and the general manager of Kirkwood Mitsubishi. On the date of the theft, defendant approached the general manager in the dealership building and inquired about a Mitsubishi Galant on the parking lot. The manager directed defendant to the showroom floor and later saw him briefly in the new car showroom.

State v. McIntyre, 749 S.W.2d 420 (Mo.App., E.D. 1988) (A-79). After respondent's conviction and sentence, petitioner appealed to the Missouri Court of Appeals. He raised a double jeopardy claim before that court based on **Brown v. Ohio**, 432 U.S. 161 (1977); however, the Missouri Court of Appeals affirmed the conviction and sentence (A-85-A-86). Respondent pursued no state post-conviction remedies (A-6).

On September 2, 1988, respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (A-94). After litigation before the district court, Magistrate David Noce filed his Report and Recommendation that the petition be denied (A-34). District Judge Edward L. Filippine adopted the recommendation (A-40).

On November 30, 1988, respondent filed a motion to alter or amend the judgment (A-103). The district court ordered petitioners to respond to the pleading (A-42). After further litigation, the Magistrate again recommended that the petition be denied (A-47). The district court adopted the Magistrate's Report and Recommendation (A-66). The district court denied respondent's request for a certificate of probable cause to appeal (A-68); however, the certificate was granted by the Court of Appeals (A-71).

On appeal before the Court of Appeals, petitioners asserted, inter alia, that review of the double jeopardy claim was barred under

the retroactivity rules of **Teague v. Lane**, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (A-8-A-9). The Court of Appeals agreed that **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), was a "new rule" under **Teague** (A-15), but that it fit within the first recognized exception to the **Teague** retroactivity doctrine (A-16-A-22). Citing **United States v. Felix**, 926 F.2d 1522 (10th Cir. 1991), cert. granted, 112 S.Ct. 47 (1991) (A-25), the Court of Appeals determined that respondent's double jeopardy claim warranted relief (A-22-A-32). Petitioners' petition for rehearing or rehearing en banc was denied on August 30, 1991, as amended on September 4, 1991 (A-89). The present petition for writ of certiorari ensues.

ARGUMENT

I.

A habeas corpus applicant may not request the retroactive application of new law under the Double Jeopardy Clause under a theory that the new rule would deprive the government of the power to punishment.

To justify a grant of certiorari, petitioners must show either a conflict between the lower-court opinion and opinions from other circuits or this Court. Alternatively, petitioners must show an important question of federal law which has not been, but should be settled by this Court. Supreme Court Rule 10.1(a), (c). The present case represents an opportunity for this Court to discuss the exceptions to the **Teague** retroactivity rules. Accordingly, the writ of certiorari should issue.

Petitioners candidly admit that they are aware of no classic conflict between the lower-court opinion and the opinions of other

circuits concerning the retroactivity issue. On the other hand, petitioners are aware of no federal court's circumvention of the **Teague** retroactivity rule by finding the existence of the first exception to that rule. The United States Court of Appeals for the Eighth Circuit stands alone on this finding.

Petitioners and the lower court agree that respondent's request that the court apply the double jeopardy principles of **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct 1084, 109 L.Ed.2d 548 (1990), was a request that the court apply "new law" retroactively (A-15). The **Grady** rule was not "dictated" by prior precedent; therefore, it was a "new rule" under **Teague** (A-15).

Petitioners and the lower court agree that the second exception to **Teague** is inapplicable. The Double Jeopardy Clause concepts of **Grady** do not require the observance of procedures that are implicit in the concept of ordered liberty (A-16, quoting **Teague v. Lane**, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

Petitioners and the lower court diverge on the issue of whether the first exception to the **Teague** retroactivity doctrine is applicable. In **Teague**, this Court described that exception.

> [A] new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."

Teague v. Lane, 109 S.Ct. at 1073, quoting **Mackey v. United States**, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.).

Petitioners are aware of no other courts that have found the first exception to be met in determining that the **Teague** retroactivity doctrine should not apply. The significance of the Court of Appeals' finding of this exception is enormous to the states within the circuit given the track record of the United States Court of Appeals for the Eighth Circuit in applying exceptions to another established doctrine. The Court of Appeals has managed to expand the "extraordinary" exception of

"probable actual innocence" to include a garden-variety of habeas cases. See, e.g., **Pilchak v. Camper**, 935 F.2d 145 (8th Cir. 1991); **Jones v. State of Arkansas**, 929 F.2d 375 (8th Cir. 1991); **Henderson v. Sergeant**, 926 F.2d 706 (8th Cir.), modified, 939 F.2d 586 (8th Cir. 1991); **Bliss v. Arkansas**, 891 F.2d 1335 (8th Cir. 1989); see generally Lay, Statement of Chief Judge Donald P. Lay Eighth Circuit Court of Appeals Before the Senate Judiciary Committee In re: Habeas Corpus Reform in Capital Cases, 19 Capital University Law Review 659 (1990); Lay, The Constitution, the Supreme Court, and Mr. Meese: Habeas Corpus and the Doctrine of Original Intent, 4 Detroit College of Law Review, 983 (1986) (articles discussing author's view of "miscarriage of justice" exception to procedural default analysis). Indeed, in **Pilchak** and **Jones**, the defendants were "innocent" merely because the panels of appellate judges did not like the sentences the defendants received. Petitioners believe that

it is necessary for this Court to review and discuss its construction of the first exception to **Teague** rather than allow the Eighth Circuit to infect itself and other federal courts with an improper interpretation of that exception.

In **Teague**, the Court articulated the first exception to the retroactivity doctrine. Under that exception, a habeas applicant may rely on a "new rule" of law "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" (A-16, quoting **Teague v. Lane**, 490 U.S. at 311). Of course, the **Teague** opinion quotes Justice Harlan's concurrence in **Mackey v. United States**, 401 U.S. at 692.

In **Mackey**, Justice Harlan identifies several examples of this exception. Id. at 692 n. 7. These examples include rules that preclude prosecution of (1) expressive conduct protected by the First Amendment, **Street v. New York**, 394 U.S. 576 (1969); (2) silence protected by the

Fifth Amendment, **Grosso v. United States**, 390 U.S. 62 (1968); (3) certain protected intimate behavior, **Loving v. Virginia**, 388 U.S. 1 (1967); **Griswold v. Connecticut**, 381 U.S. 479 (1965); and (4) conduct in the constitutionally protected privacy of one's home, **Stanley v. Georgia**, 394 U.S. 557 (1969).

Since the double jeopardy rule of **Grady** does not involve the decriminalization of the offense of felony stealing, the first exception from **Teague** is simply inapplicable. The Court of Appeals appears to concede as much from its failure to discuss this **Teague** exception. Rather, the Court of Appeals almost immediately begins its discussion of **Penry v. Lynaugh**, 492 U.S. 302 (1989) (A-16).

A different aspect of the first **Teague** exception was discussed by this Court in **Penry**. In that case, the Supreme Court extended the **Teague** doctrine to capital-sentence collateral proceedings. Accordingly, it was appropriate

that the first **Teague** exception expanded to the context of capital sentences.

The Court of Appeals accurately quotes the language from the **Penry** opinion (A-17). The Court of Appeals then goes on to quote language from **Butler v. McKellar**, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), for the proposition that the "first **Teague** exception [encompasses] '"categorical guarantees accorded by the Constitution' such as a prohibition on the imposition of a particular punishment on a certain class of offenders'" [sic]" (A-18, quoting **Butler v. McKellar**, 110 S.Ct. at 1218). The Court of Appeals interprets the "such as" language as giving it a commission to create new exceptions to the **Teague** retroactivity rule.

Petitioners, however, believe that the "such as" language from this Court referred directly to the language from this Court that followed the "such as" language--that being "a prohibition on the imposition of a particular

punishment on a certain class of offender." Petitioners also believe that this "such as" language refers to the "categorical guarantees accorded by the Constitution" that were discussed in the first aspect of the first **Teague** exception--the guarantees discussed by the Court in **Teague** and by Justice Harlan in **Mackey**. This interpretation is logical. Since **Penry** extended **Teague** to the capital sentencing situation, the first exception had to be modified in order for it to make sense in a sentencing context. Of course, respondent's request for the application of "new law," **Grady**, is unsupported by the plain words of **Teague**, **Penry** or **Butler**. The Court of Appeals provides no explanation for reading the language as something other than what this Court says it means.

This criticism is even more telling in light of the express language in **Saffle v. Parks**, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). In **Saffle**, the Supreme

Court was quite clear as to the scope of the first exception to the **Teague** retroactivity rules:

> The rule sought by Parks would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons.

Id. at 1263; see **Smith v. Black**, 904 F.2d 950, 986 (5th Cir. 1990); **Wickham v. Dowd**, 914 F.2d 1111, 1115-1116 (8th Cir. 1990), cert. denied, 111 S.Ct. 2897 (1991). Indeed, in **Wickham**, the Court examined the new rule and determined that it did not protect the petitioner due to his status or due to the nature of the offense. Id. Likewise, the **Grady** "new rule" does not prohibit punishment for reasons of respondent's status or the nature of his offense.

If one were to assume that the previous analysis is incorrect and that this Court wishes the first **Teague** exception to apply to requests for "new law" that this Court has not yet listed, then petitioners suggest that the

Double Jeopardy Clause protections discussed in **North Carolina v. Pearce**, 395 U.S. 711, 717 (1969), are not "categorical guarantees accorded by the Constitution" within the meaning of **Butler v. McKellar**. Those **Pearce** guarantees are the prohibition against a second prosecution for the same offense after acquittal, the protection against a second prosecution for the same offense after conviction, and the protection against multiple punishments for the same offense. Id. At least in the context of the second-trial protections, the Double Jeopardy Clause's protections are procedural in nature and are designed to ensure that the government litigates a criminal prosecution fully in the first trial.

The Court of Appeals discusses extensively the protection against multi-punishment (A-19). The rule in **Grady**, however, does not implicate the multi-punishment protection of the Double Jeopardy Clause. See **United States v. Chippas**, 942 F.2d 498, 500 (8th Cir. 1991), quoting,

United States v. Oritz-Alarcon, 917 F.2d 651, 654 (1st Cir. 1991), cert. denied, 111 S.Ct. 2035 (1991). The rule in **Grady** implicates only the protections from second trials. Id. The Court of Appeals' language concerning multi-punishment is absolutely beside the point. Whether the first exception to the **Teague** retroactivity rule is implicated by the multiple-punishment protection is an issue best left for a multiple-punishment-protection/double jeopardy case, not a successive prosecution case. The multiple-punishment protection is different than the multi-prosecution protection. **North Carolina v. Pearce**, 395 U.S. at 717.

The Court of Appeals also refers the readers to some pre-**Teague** cases concerning the retroactive application of Double Jeopardy Clause decisions (A-20-A-21, citing **Robinson v. Neil**, 409 U.S. 505 (1973)). After **Robinson**, however, there has been a radical change in this Court's view of the Double Jeopardy

Clause. This Court no longer believes that a double jeopardy claim deprives the trial court of "jurisdiction." Indeed, double jeopardy is now perceived as a personal right that a defendant may waive. See **United States v. Broce**, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Given the change in attitude by this Court, the Court of Appeals' reference to **Robinson** and its underlying rationale is ill-founded.

In **United States v. Broce**, the Court declared that a defendant who has entered a plea of guilty to a criminal charge may not assert a double jeopardy claim in a collateral attack upon the sentence. Id., 109 S.Ct. at 765 (emphasis added). Defendant Broce waived his right to challenge his conviction on double jeopardy grounds by entering the plea of guilty. Id., 109 S.Ct. at 766; see **Taylor v. Whitley**, 933 F.2d 325, 328-329 (5th Cir. 1991); **Horsey v. State**, 747 S.W.2d 748, 754-756 (Mo.App., S.D. 1988). Indeed, the lower court

had held earlier that a valid plea of guilty waives a double jeopardy claim. **United States v. Connelly**, 503 F.2d 520 (8th Cir. 1974); **Harris v. United States**, 237 F.2d 274 (8th Cir. 1956). Respondent's "new rule" hardly constitutes a "categorical guarantee accorded by the Constitution." No aspect of the first exception to the **Teague** retroactivity doctrine is applicable.

Missouri and the other states located in the Eighth Circuit are faced with a court that wishes to extend "categorical guarantees accorded by the Constitution" beyond the two situations discussed by this Court in **Teague** and **Penry**. Where will it stop? Missouri suspects that a variety of common constitutional claims will eventually become "categorical guarantees" within the Eighth Circuit unless this Court grants review. That other courts of appeals may adopt such an elastic reading of this Court's language is possible, if not probable. This Court's grant of a writ of

certiorari will allow this Court to speak authoritatively upon this issue.

II.

The Double Jeopardy Clause does not prohibit a second trial for conduct where evidence of that conduct was admitted at an earlier trial, but the government had no burden to present evidence of that conduct or to prove that conduct beyond a reasonable doubt, and where the state proposes to admit evidence of conduct that was proved beyond a reasonable doubt at an earlier trial, but which the government has no burden to present evidence of that conduct or to prove that conduct beyond a reasonable doubt at a second trial.

The United States Court of Appeals for the Eighth Circuit found that respondent's constitutional rights under the Double Jeopardy Clause were violated by his prosecution in the St. Louis County Circuit Court for felony theft after he had been prosecuted in the St. Louis City Circuit Court for the offense of tampering. The tampering conduct occurred on November 24, 1985, in the jurisdiction of the City

of St. Louis. See § 541.033, RSMo 1986 (jurisdiction in county where offense occurred). The felony theft occurred on November 22, 1985, in the jurisdiction of St. Louis County (A-3-A-4). See id. Under the circumstances of this case, respondent is unable to demonstrate a violation of his rights under the Double Jeopardy Clause.

For the purposes of this petition, petitioners will assume the correctness of the lower court's finding that, "at the second trial, for stealing, the government presented essentially the same evidence" (A-27).

In June, 1986, a jury in the Circuit Court of the City of St. Louis found respondent guilty of first-degree tampering under § 569.080, RSMo 1986, based on respondent's operation on November 24, 1985, of an automobile knowing that he acted without the owner's consent. In February, 1987, a jury in the Circuit Court of St. Louis County found respondent guilty of felony stealing under § 570.030, RSMo 1986, based on his stealing an automobile

from a car dealership on November 22, 1985 (A-2-A-3). The issue is thus whether the Double Jeopardy Clause prohibited the second trial, the St. Louis County trial for stealing.

Conspicuously missing from the Court of Appeals' description of the case is the fact that respondent was not convicted or acquitted of an offense from his conduct on November 22, 1985, at respondent's first trial, the June, 1986 trial. Testimony concerning that November 22 conduct was admitted at the first trial; however, the State had no burden to prove that conduct beyond a reasonable doubt. The verdict director for tampering referred only to November 24 conduct. Evidence concerning the November 22 conduct was admitted at the first trial, but simply as "evidence of other crimes" in that it tended to show respondent's knowledge that he was operating the automobile on November 24 without the consent of the owner (A-75-A-76). Nothing in the protection of the Double Jeopardy Clause against a second

prosecution for an offense following acquittal or retrial should prohibit the government's use of such "evidence of other crimes." See e.g., Fed. R. Evid. 404(b) (evidence of other crimes admissible in similar circumstances in civil and criminal federal-court trials); **United States v. Felix**, 926 F.2d 1522, 1534 (10th Cir.) (Anderson, J., dissenting) (condemning reading of Double Jeopardy Clause to eviscerate Fed. R. Evid. 404(b)), cert. granted, 112 S.Ct. 47 (1991). This case does not implicate the double jeopardy protections described by this Court in **North Carolina v. Pearce** since there was no second prosecution following an acquittal or finding of guilty for the November 22 conduct.

In **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), this Court quotes directly the language from **North Carolina v. Pearce** concerning the protections of the Double Jeopardy Clause. **Grady v. Corbin**, 110 S.Ct. at 2090, quoting **North Carolina v.**

Pearce, 395 U.S. 711, 717 (1969). The **Grady** Court does not modify those basic protections. The lower court does correctly articulate the rule from **Grady**.

> Once a subsequent prosecution survives the **Blockberger** test, the court must next analyze if "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.

[A-23, quoting **Grady v. Corbin**, 110 S.Ct. at 2093]. The error in the lower court's decision is that at respondent's first trial, he was not "prosecuted" for conduct that occurred in St. Louis County on November 22 (stealing); rather, he was prosecuted for conduct and convicted of an offense that occurred in the City of St. Louis, a separate venue, on November 24 (tampering). An examination of the charging document from the first prosecution will reveal that only the November 24 tampering in the City

of St. Louis was charged. An examination of the verdict director will demonstrate that only the November 24 tampering in the City of St. Louis was submitted to the jury (A-28 n. 4). Felony stealing was not charged at the first trial. Only conduct that occurred on November 24 was prosecuted at the first trial. Only conduct that occurred in the City of St. Louis was prosecuted at the first trial. At respondent's second trial, the State proved conduct that constituted an offense for which respondent had not already been prosecuted. There is no doubt that evidence of conduct on November 22 (stealing) was presented at the first trial; however, that was not the conduct for which respondent was being prosecuted.

Does the government's submission of "evidence of other crimes" at the first trial constitute a "prosecution" within the meaning of **Grady**? The Court of Appeals declines to suggest an answer to this question. Indeed, the Court of Appeals declines to suggest this as a

question. Respondent believes that the answer to this question may be found in **Dowling v. United States**, 493 U.S. 342 (1990). In **Dowling**, the government offered other-crimes evidence of the defendant's conduct that occurred two weeks after the charged conduct. The defendant had been acquitted of charges arising from the evidence of other crimes. Notwithstanding that acquittal, the collateral estoppel aspect of the Double Jeopardy Clause did not prohibit introduction of the evidence of other crimes at the later prosecution. The Court reasoned that the burden of proof at the first criminal prosecution differed from that at the second trial where the evidence of other crimes was submitted; thus, the collateral estoppel component of the Double Jeopardy Clause was inapplicable. Id. at 672.

Applying the **Dowling** concepts to the case at bar reveals that respondent was not "prosecuted" for stealing at the first trial. Stealing was not charged in the charging documents.

Stealing was not submitted in the verdict director. Only the November 24, 1985 conduct (tampering) was charged and submitted. Only St. Louis City conduct was charged and submitted. At the first trial, the jury was under no obligation to convict or acquit respondent of stealing. In fact, the government had no obligation to present any evidence of behavior concerning the stealing conduct. Since the first trial had no attributes of a "prosecution" for stealing, the double jeopardy protections of **North Carolina v. Pearce** and **Grady v. Corbin** are inapplicable. See **United States v. Felix**, 926 F.2d at 1534 (Anderson, J., dissenting).

What about the proof of the tampering conduct presented at the second trial for the November 22 stealing? Of course, the stealing indictment did not "require" the tampering conduct to be proved (A-25, quoting **United States v. Felix**, 926 F.2d at 1532 (Anderson, J., dissenting)). The stealing indictment did

not require the proof of conduct that occurred two days later and in a different jurisdiction. Rather, it was purely discretionary with the government to introduce information concerning the tampering conduct. Further, there is no requirement that the tampering conduct be proved to establish an essential element of the stealing offense. The tampering conduct need not be proved beyond a reasonable doubt. Indeed, since tampering was not submitted to the jury in the stealing verdict director, petitioners are hard-pressed to see how it could be "an essential element of the [stealing] offense" (A-25). Indeed, it is conceivable that the jury at the second trial entirely disbelieved the evidence concerning the tampering conduct but still found respondent guilty of the stealing offense. Given that possibility, the question, "Is [tampering] being proven to establish an essential element of the offense for which the defendant is now being prosecuted?", must be answered no (A-25).

From this discussion, it should be apparent that the panel has misapplied the principles of **Grady**, in specific, and **North Carolina v. Pearce**, in general.

Given this Court's recent grant of a writ of certiorari in the **Felix** case, the Court may decide that it is appropriate to remand this cause to the Court of Appeals for further consideration in light of this Court's future opinion in **Felix**. Further, this is an issue of exceptional importance in all cases where "evidence of other crimes" is used to demonstrate motive, intent, common scheme and plan, etc. In reality, the present case is simply an "evidence of other crimes" case. To this date, petitioners are unaware of any court holding that the Double Jeopardy Clause prohibits trial for offenses that were previously presented to a court as "evidence of other crimes."

III.

This Court misconstrued the Double Jeopardy Clause of the Fifth Amendment in **Grady v. Corbin**.

This Court's decision in **Grady v. Corbin**, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), signifies a radical departure from this Court in interpreting the Double Jeopardy Clause of the Fifth Amendment. Petitioners submit that the **Grady** decision is insufficiently supported by precedent and is unworkable in practice and, therefore, should be overruled.

The Double Jeopardy Clause of the Fifth Amendment states:

> [N]or shall any person be subject for the same offense to be put twice in jeopardy of life or limb.

The basic test for determining whether a successive prosecution, involving conduct that violates two distinct statutory provisions, contravenes double jeopardy principles, is set forth in **Blockberger v. United States**, 284 U.S.

299 (1932). Thus, if each statute requires proof of a fact that the other does not, there is no double jeopardy violation. **Iannelli v. United States**, 420 U.S. 770, 785 n. 17 (1975).

In **Grady**, however, this Court determined that a subsequent prosecution must not only survive the **Blockberger** test, **Grady v. Corbin**, 110 U.S. at 2093, but ruled that the Double Jeopardy Clause also bars "any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." The emphasis, however, is not on the evidence used to prove that conduct, but, rather, is on what conduct the state will prove. Id.

Petitioners submit that this approach is unworkable. One of the principal problems with this analysis is how to reconcile **Grady** with **Dowling v. United States**, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Under

Dowling, the government, in a subsequent prosecution, may introduce evidence of a previous crime--"prove conduct"--to establish a defendant's commission of a later, similar crime-"to establish an essential element"--even if the defendant was acquitted in the previous prosecution. Whenever possible, the government introduces such evidence of a defendant's conduct from a previous prosecution to establish an essential element of an offense in a subsequent prosecution, but such proving of conduct to establish an essential element of an offense in a subsequent prosecution may now be barred by **Grady**.

Thus, it appears that in those cases in which evidence of a defendant's conduct from a previous prosecution would be admissible pursuant to **Dowling** in a subsequent prosecution would often be the same cases that **Grady** bars from being prosecuted. The State is left with little comfort in knowing that although the subsequent prosecution is barred under **Grady**,

if it had not been so barred, the State could have admitted into evidence and established a defendant's guilt via proof of a defendant's conduct from a previous prosecution under **Dowling**. **Grady** may have rendered the government's rights under **Dowling** a nullity in the majority of cases.

The **Grady** opinion also offers few clues as to how a subsequent trial court is to know on what conduct the government relied to garner a conviction in a previous prosecution. Does a defendant's double jeopardy rights in a subsequent prosecution extend only as far as the details of his conduct are contained in the charging document in the previous prosecution? As far as the evidence produced by the state in the previous prosecution? As far as all of the evidence adduced at the previous prosecution, including the defendant's evidence? Whatever minimal attraction the **Grady** approach may have in theory, it is clearly unworkable in practice.

Furthermore, the Court's statement that the critical inquiry is not on the evidence used to prove the conduct for which a defendant has already been prosecuted, but what conduct the State will prove, is a circular syllogism. One could similarly argue that under **Dowling**, the critical inquiry is not on what conduct the state will prove via the evidence from the previous prosecution and that the state wishes to introduce at a subsequent prosecution; rather, the key is what evidence from the previous prosecution the state will use to prove that conduct in a subsequent prosecution. The terms "conduct" and "evidence" do not exist in vacuum, and the **Grady** opinion offers no guidance as to how to separate the two.

Thus, in **Grady**, if the state were to have proceeded and properly prosecuted the defendant for manslaughter by proving Corbin's driving too fast, the state could not have relied on the conduct for which the defendant was previously convicted--driving while intoxicated and

failing to keep to the right of the median. The state, however, may introduce evidence that Corbin was intoxicated and crossed the median, under **Dowling**, to prove the existence of a statutory element--that Corbin was operating a motor vehicle on a public highway--in a subsequent prosecution. It is clear that the two cases cannot be rationally reconciled.

Finally, although the Court claims it has not adopted a single-transaction view of the Double Jeopardy Clause in **Grady**, the effect of **Grady** will be the same. Prosecutors will now be forced to bring all charges against a defendant, growing out of a single criminal transaction, and try the charges in one proceeding. Otherwise, the government runs the great risk of violating the murky waters of **Grady**. In effect, a view that the Court has "steadfastly refused to adopt," **Garrett v. United States**, 471 U.S. 777, 790 (1985), will be adopted.

The significance of this in cross-jurisdictional cases such as the present one (St.

Louis City and St. Louis County) and **United States v. Felix**, 112 S.Ct. 47 (1991) (grant of certiorari) (Western District of Missouri and Eastern District of Oklahoma), is obvious. Under Missouri statute, a court has jurisdiction when the offense occurred within the geographic boundaries of the court. Section 541.033, RSMo 1986. If **Grady** were to remain the controlling law, then the government will only have power to prosecute in one jurisdiction even though a crime spree, conspiracy, etc., occurs in multiple local jurisdictions.

Petitioners submit that the **Grady** decision is irreconcilable with **Dowling** and unworkable in practice. Accordingly, petitioners respectfully request this Court grant certiorari in order to examining the continuing vitality of **Grady**.

CONCLUSION

Petitioners respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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